89-335

No.

FILED
AUG 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT E. BORMANN, DOMENICK R. FERRANTINO, TIMOTHY J. FERRITER, HARRY M. GARDENER, RONALD A. JACOBSEN, JAMES W. MEYERS, HELMUT SAARTS, CORNELIUS J. SMITH, KARL ORTLER, ALBERT J. TAGGI, NEVILLE SMITH and THOMAS J. McGUIRE,

Petitioners,

vs.

AT&T COMMUNICATIONS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit erred in affirming the District Court's granting of the respondent's motion for summary judgment.

2. Whether the United States Court of Appeals for the Second Circuit erred in affirming the District Court's ruling that the petitioners had knowingly and voluntarily signed a release of any and all claims arising under the Age Discrimination In Employment Act. (29 U.S.C. § 621, et. seq.).

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In The

Supreme Court of the United States

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No.

ROBERT E. BORMANN, DOMENICK R. FERRANTINO, TIMOTHY J. FERRITER, HARRY M. GARDENER, RONALD A. JACOBSEN, JAMES W. MEYERS, HELMUT SAARTS, CORNELIUS J. SMITH, KARL ORTLER, ALBERT J. TAGGI, NEVILLE SMITH AND THOMAS J. McGUIRE,

Petitioners,

-against-

AT&T COMMUNICATIONS, INC.,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR PETITIONERS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray for a writ of certiorari to review the decision of the

United States Court of Appeals for the Second Circuit, which was entered on May 25, 1989.

DECISIONS BELOW

The decision of the Second Circuit Court of Appeals is reproduced in Appendix A. The judgment of the District Court, which was affirmed by the Court of Appeals, is reproduced as Appendix B. The Memorandum and Order of the District Court, dated March 28, 1988 is reproduced as Appendix C.

JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28 United States Code, § 1254(1). The judgment of the Court of Appeals was entered on May 25, 1989.

STATEMENT OF THE CASE

A. INTRODUCTION

This action was originally commenced in the United States District Court for the Southern District of New York. The petitioners are former employees of respondent AT & T Communications, Inc., a nationwide corporation which specializes in the area of telephonic and telegraphic communications.

The petitioners allege that they were unlawfully and discriminatorily discharged from their employment in violation of § 623 of the Age Discrimination In Employment Act. More specifically, they claim that their discharge was part of a systematic program implemented by the respondent to dismiss all their employees

over a certain age in direct violation of the law.

B. THE NATURE AND PURPOSE OF THE AGE DISCRIMINATION AND EMPLOYMENT ACT OF 1967.

The Age Discrimination In Employment Act of 1967 (hereinafter "ADEA") was enacted to protect older employees from discriminatory practices by their employers. The statute was amended in 1978 to extend the scope of its coverage. Its purpose was to prevent discrimination on the basis of age in the areas of hiring, benefits and compensation, and termination of employment. More specifically, it was designed to "prohibit the mandatory retirement, pursuant to the terms of employee benefit plans or seniority systems, of individuals within

the protected age group." The original act covered employees from ages forty (40) to sixty-five (65), but the 1978 Amendment extended coverage to age seventy (70). It applies to any employer having twenty (20) or more employees, public employers, employment agencies and labor organizations with twenty-five (25) or more members.

Due to the economic realties of the last twenty years, older employees have had to postpone retirement. The statute was designed to give an older employee more freedom in deciding whether to forego retirement benefits. An employer may not terminate an employee based upon outmoded generalizations, but must consider the qualifications of the individual employee in determining whether or not to terminate him.

C. THE PRESENT CASE.

Each of the petitioners in this action was terminated from his employment between January 15, 1986 and March 1, 1986. At the time of termination, each petitioner was at least fifty-one (51) years of age and had given an average of twenty-five (25) years of service to the respondent.

As a result of the nationwide divestiture of AT & T Communications, Inc. in 1982, the respondent decided to cut expenses by reducing its work force. As part of its plan, it instituted the "Termination Payment Plan for Surplus Management Employees and Summary Plan Description (hereinafter "SPD"). The purpose of the plan was to provide separation payments to any employee designated as a

surplus management employee who was not placed in another position within the company before their termination date. The program offered a designated employee two options. The first option awarded a lump-sum payment equal to five percent (5%) of the base annual salary multiplied by the number of years of service. The second option awarded a lump-sum payment of three percent (3%) of the base annual salary multiplied by the number of years of service. The multiplying factor was limited to twenty (20) years. The only difference between the two options was that under the five percent (5%) plan the employee had to sign a separation agreement whereby he released any and all claims under state and federal law relating to termination of his employment. Those employees electing the three (3) percent option did not have

to sign any document before receiving the benefits.

As part of its implementation of the SPD program, several meetings were held both in New York City and White Plains, New York to explain the program to affected employees. At these meetings, several of the employees expressed concerns regarding the release agreement. Several times during these meetings, representatives of the respondent made statements that their legality and binding effect was questionable. Each of the petitioners, either from these statements or through discussions with fellow employees, was left with the impression that the release would not be upheld in court.

Each of the petitioners opted for the five percent (5%) plan, and executed the release form provided by the respondent. Pursuant thereto, each of the petitioners

was terminated between January 15, 1986 and March 1, 1986.

This action was commenced by the filing of a complaint on June 12, 1987. The gravamen of the complaint was that the plaintiffs were unlawfully and discriminatorily discharged from their employment in direct violation of the ADEA. By way of an answer and counterclaim, the respondent alleged that the action was barred by and in violation of the release agreement which was executed by each of the petitioners prior to their termination.

THE DECISIONS BELOW

On December 31, 1987 the respondent filed a motion for summary judgment pursuant to F.R.C.P. Rule 56. On March 28, 1988 the respondents' motion was denied.

The District Court, per Chief Judge Brieant, found that there existed a genuine issue of material fact as to whether

the release were knowingly and voluntarily executed. Relying primarily on Runyan v. National Cash Register Corporation, 573 F. Supp. 1454 (S.D. Ohio, Western Division, 1985), aff'd. 787 F. 2d 1039 (Sixth Circuit, 1986), cert. den. 107 S. Ct. 178 (1986), the Court concluded that an unsupervised waiver of rights can bar a claim under the ADEA if the waiver is made knowingly and voluntarily. Whether the representations made by the respondent as to the legality of the releases vitiated any knowing and voluntary waiver was a question of fact which required a separate trial pursuant to Rule 42 (b).

The issue was tried by Judge Brieant on November 21 and 22, 1988. At the conclusion of the trial, Judge Brieant dismissed the complaint upon the ground that the releases executed by the petitioners was a complete bar to their claim.

The United States Court of Appeals of the Second Circuit affirmed the decision of the District Court. Judge Feinberg, writing for the Court, stated that the ADEA does not bar unsupervised waivers of rights. The Court disregarded recent congressional action in this area, which evidences an intent to severely limit unsupervised waivers (Department of Commerce, Justice and State, the Judiciary and Related Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216 (1988); Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329. 31 (1987); Age Discrimination in Employment Waiver Protection Act, S. 54, 101st Cong., 1st Sess. 135 Cong. Rec. S357 (daily ed. January 25, 1989); 135 Cong. Rec. E816 (daily ed. March 15, 1989). "If Congress passes the bills that are now before it, the amendment will, of course, be

an authoritative expression of what the 1989 Congress intended, . . . but until it does so, we can find no persuasive reason to disagree with statutory interpretation of our sister circuits." (citing Coventry v. United States Steel Corporation, 856 F. 2d 514 (Third Circuit, 1988); Runyan v. National Cash Register Corporation, supra)). It held that the District Court correctly applied the "totality of the circumstances" standard as elucidated in Coventry in concluding that the releases were executed knowingly and voluntarily. The Court upheld the District Court's granting of summary judgment in favor of the respondent and dismissing the complaint.

REASONS FOR GRANTING THE WRIT

POINT ONE

THE DISTRICT COURT SHOULD NOT HAVE GRANTED THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

The District Court should not have granted the respondent's motion for summary judgment. It had initially denied the motion on the ground that a genuine issue of fact existed as to the validity of the waivers executed by the petitioners. After a hearing on that issue, the Court granted the motion and dismissed the complaint. The Court misapplied the law to the facts of the case. Therefore, the decision should be reversed.

Summary judgment is a drastic remedy which should not be granted when there is any doubt as to the existence of a triable issue of fact. G.D. Searle and Co. v. Charles Pfizer & Co., 231 F. 2d 316

(Seventh Circuit, 1956). Cf. Moylan v. National Westminster Bank U.S.A., 687 F. Supp. 54, 57 (E.D.N.Y., 1988) (summary judgment should be granted only "if the evidence discloses 'no genuine issue as to any material fact and ... the moving party is entitled to a judgement as a matter of law.'"). Any doubt as to the existence of fact must be resolved in favor of the non-moving party, and all "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion." Chipollini v. Spencer Gifts, Inc., 814 F. 2d 893, 900 (Third Circuit, 1987). Even if they do not dispute the facts, summary judgment should not be granted if the parties do not agree on the inferences to be drawn therefrom. International Union of Bricklayers &

Allied Craftsmen Local Union No. 20, AFL-CIO v. Jackson, 752 F. 2d 1401 (Ninth Circuit, 1985).

In reviewing the facts of this case in the light most favorable to the petitioners, the District Court failed to assume that the allegations in the complaint were true for purposes of the motion. First National Bank of Cincinnati v. Pepper 454 F. 2d 626 (Second Circuit, 1972). The threshold issue was whether the petitioners waived their rights under the ADEA by signing the release agreement as a result of misrepresentations made by the respondent. Rather than deciding that issue or the pleadings, the Court set the matter down for trial. Judge Brieant heard testimony from both sides, and decided the motion solely upon the credibility of the witnesses. "[T]he court cannot try issues of fact; it can only determine

whether there are issues to be tried." Heyman v. Commerce and Industry Insurance Company, 524 F. 2d 1317, 1319 (Second Circuit, 1975). By conducting an evidentiary hearing, and then summarily dismissing the complaint, the District Court effectively denied the petitioners their right to a plenary trial. It clearly exceeded its limited function as issue finder; it usurped the trial court's power of issue determination. See Goodman v. Meade Johnson & Co., 534 F. 2d 566 (Third Circuit, 1976), cert. den. 429 U.S. 1038 (1976). Therefore, its decision to grant the respondent's motion for summary judgment should be reversed.

POINT TWO

THE DISTRICT COURT ERRED IN RULING THAT THE PETITIONERS HAD KNOWINGLY AND VOLUNTARILY WAIVED ALL CLAIMS ARISING UNDER THE ADEA.

The District Court erred in ruling that the petitioners had knowingly and voluntarily waived all claims arising under the ADEA. The petitioners presented clear and convincing proof that they were discharged from their employment in direct violation of the statute. The waiver that they executed does not bar them from pursuing their claim because it does not fulfill the requirements for a "knowing" and "voluntarily" waiver of their rights.

This Court has recognized a statutory right to trial by jury in any suit brought for violation of the ADEA. Lorillard v. Pons, 434 U.S. 575 (1978). Due to a clerical error, the pleadings that were filed never indicated the petitioners' desire

for a jury trial. Therefore, they were deemed to have waived this right. Nevertheless, they were still entitled to a full trial on all the issues raised. The petitioners have met their burden of establishing a prima facie case of age discrimination, to wit: 1) they are all in the age group for which the statute was designed to protect, 2) they were all qualified for the positions that they held, 3) they were all terminated from their employment, and 4) they were all replaced by younger persons See White v. AT&T Information Services, Inc., 869 F. 2d 1494 (Sixth Circuit, 1989). They do not dispute the fact that they executed release agreements which purport to be a waiver of their rights under the ADEA. But they executed the releases in reliance on representations made by the respondent regarding the legality and enforceability

of the waiver provision. The fact that the respondent encouraged the petitioners to sign the agreement when it knew its legality was doubtful supports the conclusion that the respondent willfully violated the statute in that it was not at all concerned with whether the waiver was valid under the ADEA. Russo v. Trifari, Krussman & Fishel, Inc., 837 F. 2d 40 (Second Circuit, 1988).

Since the prima facie case was established, the burden shifted to the respondent to present legitimate nondiscriminatory reasons for terminating the petitioners. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Their prima facie case created a rebuttal presumption of discrimination. All the respondent had to do was produce enough evidence of a nondiscriminatory motive in order to rebut the presumption. Id. Since

it failed to do so, the lower court should have "conclude[d] that a violation has occurred and determined the appropriate remedy." Equal Employment Opportunity Commission v. Sandia Corporation, 639 F. 2d 600, 622 (Tenth Circuit, 1980).

In dismissing the Petitioners' complaint, the District Court avoided having to decide the real issue of the case. The waivers did not bar the petitioners from bringing suit because the waivers were invalid. The respondents led the petitioners to believe that the releases would have no legally binding effect "Unilateral mistake concerning the effect of a release is not a basis for setting it aside unless there is evidence that the other party obtained the release by fraud, misrepresentation, or other inequitable conduct." Schmidt-North Ford, Inc. v. Ford Motor Company, 524 F. Supp.

1099, 1104 (D. Minnesota, Fourth Division, 1981). The petitioners were misled into believing that they were not relinquishing their rights under the ADEA by executing the releases. Id. The terms of the release were not negotiated by them. Cf. Asberry v. United States Postal Service, 692 F. 2d 1378 (Federal Circuit, 1982) (settlement was the result of negotiations, and was voluntarily executed with full knowledge of the contents). At the time the releases were signed, there was no dispute between the petitioners and the respondent. By executing it, they were not waiving any existing claims that they had against the respondent, i.e., the release was not a "written contract of compromise and settlement" of an unliquidated claim. Anselmo v. Manufacturers Life Insurance Company, 595 F. Supp. 541, 549 (W.D. Missouri, W.D.,

1984), aff'd 771 F. 2d 417 (Eighth Circuit, 1985). Cf. United States v. Allegheny-Ludlum Industries, Inc., 517 F. 2d 826 (Eighth Circuit, 1985) (a release which settles a disputed employment discrimination claim is binding). Therefore, the petitioners were not bound by it, and they were free to bring suit to contest their termination.

In reaching its decision, the District Court relied on the case of Runyan v. National Cash Register Corp., 573 F. Supp. 1454 (Southern District of Ohio, Western Division, 1985), aff'd. 787 F. 2d 1039 (Sixth Circuit, 1986), cert. den. 107 S.Ct. 178 (1986). In that case, as a result of being informed that his employment would be terminated, the plaintiff entered into an agreement whereby he would provide certain consultation services in exchange for a

monthly retainer. After attempting to negotiate better terms, he signed a release by which he relinquished all claims against the defendant. In granting summary judgment in favor of the defendant, the Court stated that the release was the result of a bona fide dispute between the parties concerning plaintiff's employment and that it was supported by adequate consideration. Furthermore, the plaintiff was an attorney with many years experience in the area of labor law and employment discrimination. Therefore, he executed the release with full knowledge of the ramifications.

The present case can be readily distinguished from Runyan on its facts. The petitioners are not attorneys experienced in the area of employment discrimination. It is reasonable to assume that they were not even aware of

their legal rights under the ADEA at the time they executed the releases. The release which they executed was not the result of negotiations with the respondent concerning any factual dispute; the terms were dictated to them on a "take it or leave it" basis. See Coventry v. United States Steel Corporation, 856 F. 2d 514 (Third Circuit, 1988). They were not even given an adequate explanation as to the legal effects of the document, and the document itself is ambiguous in that it does not specifically state what rights the signatory party is actually giving up. Therefore, the petitioners did not knowingly and voluntarily relinquish any of their legal rights by executing the release. See, e.g., Equal Employment Opportunity Commission v. United States Steel Corporation, 583 F. Supp. 1357 (W.D. Pa., 1984).

In adopting the ADEA, Congress incorporated certain enforcement provisions of the Fair Labor Standards Act. Section 626 (b) of the ADEA specifically incorporates Section 216 (c) of the Fair Labor Standards Act, which gives the Secretary of Labor the authority to supervise the settlement of any claims brought pursuant to the Act. 29 U.S.C. § 216. This Court has consistently held that any waivers of rights under the Fair Labor Standards Act are invalid. Schulty, Inc. v. Gangi 328 U.S. 108 (1946); Brooklyn Savings Bank v. O'Neil 324 U.S. 697 (1945). This is especially true when a dispute arises over a legal issue, i.e., the applicability of the statute to the facts of the particular case. Runyan v. National Cash Register Corp., 787 F. 2d at 1043 (citing Strand v. Garden Valley

Telephone Company, 51 F. Supp. 898 (D. Minn. 1943)).

The courts have also compared the ADEA to Title VII of the Civil Rights Acts of 1964. Both statutes have similar purposes. A knowing and voluntary waiver which results from settlement of a claim arising under Title VII is permissible. But any waiver must be part of a settlement of a legal claim which is already been asserted rather than a "device to exempt from liability." Equal Employment Opportunity Commission v. United States Steel Corporation 583 F. Supp. at 1362 (quoting United States v. Allegheny-Ludlum Industries, Inc. 517 F. 2d at 861).

In this case, there was no actual dispute between the parties at the time that the release was executed. By making execution of the release part of their

termination procedure, the respondent was blatantly attempting to avoid liability under the ADEA. The sole issue is whether the termination procedure per se violates the statute. The petitioners must be given the opportunity to prove that age was the determining factor in the respondent's decision as to who was to be terminated under the Surplus Reduction Program. See, e.g., Cassino v. Reichhold Chemicals, Inc., 817 F. 2d 1338 (Ninth Circuit, 1987).

Considering the nature and purpose of the ADEA, as well as the amendments now pending before Congress, it is obvious that the waivers are illegal. The statute specifically was enacted to prevent the discriminatory practices that the respondent engaged in. Although the courts have not definitively ruled on the issue, the comparisons made with other

statutes which do prohibit such waivers invariably leads to the conclusion that any waiver of rights under the ADEA is invalid.

It is clear that each Circuit Court which has upheld the validity of a waiver of an ADEA claim has relied upon the holding in Runyan v. National Cash Register Corp., supra. Runyan was decided prior to Pub. L. No. 100-202 and Pub. L. No. 100-459, and the Congressional "intent" found in Runyan has been "corrected" by the Congress.

Permitting the decision below to stand will give license to any employer to discriminate against older worker by requiring them to sign a release. It is submitted that Congress, in adopting the ADEA, intended to protect older workers against age discrimination, not to license employers to engage in it.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: White Plains, New York

August 16, 1989

Respectfully Submitted,

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APPENDIX

DECISION OF
THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1026 August Term 1988

Argued: May 1, 1989 Decided: May 25, 1989

Docket No. 88-9095

----------X

ROBERT E. BORMANN, DOMENICK R. FERRANTINO, TIMOTHY J. FERRITER, HARRY M. GARDNER, RONALD A. JACOBSEN, JAMES W. MEYERS, HELMUT SAARTS, CORNELIUS J. SMITH, KARL ORTLER, ALBERT J. TAGGI, NEVILLE SMITH and THOMAS J. McGUIRE,

Plaintiffs-Appellants,

- against -

AT&T COMMUNICATIONS, INC.,

Defendant-Appellee.

----------X

Before: KAUFMAN, FEINBERG and NEWMAN,

Circuit Judges.

Appeal from judgment of United States District Court for the Southern District of New York, Charles L. Brieant, Ch. J., holding that appellants' unsupervised waiver of the right to institute a lawsuit relating to termination of their employment barred their subsequent suit for age discrimination.

Judgment affirmed.

CHARLES A. BRADLEY, White Plains, NY (Taylor McCullough, Goldberger & Geoghegan, of Counsel), for Plaintiffs-Appellants.

JOEL L. FINGER, New York, NY (Roberts & Finger, Carter K. Combe, of Counsel), for Defendant-Appellee.

FEINBERG, Circuit Judge:

Plaintiffs, 12 former second-level managers of AT&T Communications, Inc. (AT&T), appeal from a judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, Ch.J., dismissing their claims

under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA). The dismissal was based upon appellants' knowing and voluntary waiver of their right to sue AT&T for age discrimination. For reasons given below, we affirm.

Background

During a significant reduction in force in 1986, AT&T eliminated appellants' second-level managerial positions in White Plains and New York City. In preparation for the reductions, AT&T developed a Termination Payment Plan for Surplus Management Employees ("The Plan"), which provided for separation payments to surplus management employees who were not placed in other available positions at AT&T by their separation date. The Plan provided departing employees with two termination payment options. Under the first option, a plan participant could

chose to receive a lump sum termination payment equal to 5% of the manager's base pay per year multiplied by the number of years of net credit service up to a maximum of 20 years. Under the second option, a manager could choose to receive only 3%, rather than 5%, of base pay in applying this formula. Thus, under the first option, an employee with 20 or more years of service would receive a termination payment equal to a year's base pay. Under the second option, such an employee would receive a payment of only 60% of annual base pay. However, in order to receive the higher percentage under the first option, AT&T required a manager to sign a "full Legal release," which provided that the employee give up "all claims . . . and causes of action" relating to the employee's employment or termination of employment, including any

rights under laws that prohibit discrimination on the basis of age. The company advised those considering the options that "you may wish to consult your attorney." (emphasis in original). No release was required from those choosing the second, lower option.

In October 1985, representatives from AT&T's Regional Personnel Department in Oakton, Virginia conducted a series of five meetings in New York City and White plains to discuss the force reduction program and termination pay options ("Oakton meetings"). Following these meetings, all appellants chose the first option and signed the separation agreements and releases in late 1985 and early 1986. Since each appellant had been at AT&T for more than 20 years and each received a salary of approximately $50,000, the additional consideration for

choosing the first option was approximately $20,000 for each appellant. All appellants were discharged in early 1986.

In June 1987, appellants sued AT&T for age discrimination under the ADEA. In its answer and counterclaim, AT&T pleaded the separation agreements and releases as an affirmative defense that barred appellants' suit.

On the basis of this defense, in December 1987, AT&T moved for summary judgment. In an opinion dated March 28, 1988, the district court concluded that "an unsupervised waiver of rights can be a bar to a private action under the ADEA, so long as it is knowingly and voluntarily given." However, the court denied AT&T summary judgment because there was a dispute over whether responsible AT&T personnel had stated or implied that "the

releases were of doubtful legal enforceability," thus, in effect, persuading appellants to sign the documents on the misrepresentation that they could not, or would not, be enforced. The district court ordered a separate trial on this issue pursuant to Fed. R. Civ. P. 42(b).

The trial took place in November 1988, at which time the court heard 13 witnesses. At the close of the trial, the court found that appellants had failed to provide "sufficient evidence of misrepresentations rising to the level which would justify reasonable reliance [on the alleged false assurances] in light of the language of the instruments." Having decided this disputed issue of fact, the district court concluded that because the releases were signed knowingly, voluntarily and for valuable

consideration, appellants had waived their right to sue AT&T for age discrimination. This appeal followed.

Discussion

Appellants make a number of arguments in this court, but the strongest is that the district court erred in concluding that an unsupervised waiver of rights can bar a private action under the ADEA, so long as it is knowingly and voluntarily given. By "unsupervised," appellants mean a release entered into without the prior approval of a court or the Equal Employment Opportunity Commission (EEOC), the agency now administering the ADEA.

The issue of whether an unsupervised waiver of rights is permissible under the ADEA has been addressed by other courts of appeals. There is a "general consensus that the private settlement of claims is not inconsistent with the ADEA," Coventry

v. United States Steel Corp., 856 F.2d 514, 517 (3rd Cir. 1988), even though the ADEA incorporates by reference the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 216, 217, and private waiver of claims under the latter act has been precluded by such Supreme Court decisions as Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945), and D.A. Shulte, Inc. v. Gangi, 328 U.S. 108 (1946). See Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 540 (8th Cir.) (no absolute bar to release of claims under the ADEA), cert. denied, 482 U.S. 928 (1987); Runyan v. National Cash Register Corp., 787 F.2d 1039, 1041-43 (6th Cir.) (in banc) (same), cert. denied, 479 U.S. 850 (1986). Two district courts from this circuit have also reached similar conclusions. See EEOC v. American Express Publishing Corp., 681 F. Supp.

216, 219 (S.D.N.Y. 1988) (assuming that unsupervised waivers are permissible); DiMartino v. City of Hartford, 636 F. Supp. 1241, 1248 (D. Conn. 1986) (holding that the ADEA does not bar "voluntary and knowing" settlement of claims). The discussion in these cases of the reasons why the FLSA analogy does not control settlement of ADEA claims, a proposition with which we agree, has been ample, and we see no need to add to it.

In addition, we find persuasive the Third Circuit's analysis in Coventry, which focuses on a comparison of the ADEA and Title VII, 42 U.S.C. § 2000e et seq. 856 F.2d at 522. Under Title VII, an employee may validly waive a claim of discrimination so long as the waiver is made "knowingly and willfully." Id. (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 & n.15 (1974)). Given

that Congress intended that claims under both statutes be expeditiously resolved, Coventry, 856 F.2d at 522 n.8, and that Congress gave the statutes a common scheme for achieving the goal of voluntary compliance, DiMartino, 636 F. Supp. at 1247, we find analogizing the ADEA to Title VII appropriate in this context.

Appellants contend that recent actions by Congress indicate that these courts have misconstrued congressional intent in holding that an unsupervised waiver of rights is permissible under the ADEA. Appellants refer first to an EEOC final rule that would have permitted the unsupervised waiver of rights under the ADEA and to congressional action cutting off appropriations for enforcement of that rule. See Department of Commerce, Justice and State, The Judiciary and Related Appropriations Act, 1989, Pub. L. No. 100-

459, 102 Stat. 2186, 2216 (1988); Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987). Appellants also point to two bills recently introduced in the House and Senate that would strictly limit the use of unsupervised waivers. See Age Discrimination in Employment Waiver Protection Act, S. 54, 101st Cong., 1st Sess., 135 Cong. Rec. S357 (daily ed. January 25, 1989); 135 Cong. Rec. E816 (daily ed. March 15, 1989) (statement of Rep. Hawkins introducing House version of Age Discrimination in Employment Waiver Protection Act). Appellants claim that these appropriations acts and the introduction of these bills show that the ADEA does not permit unsupervised waivers except in settlement of a previously filed claim or charge.

We agree with appellants that this congressional activity indicates that there is now significant support in Congress for limiting the use of unsupervised waivers. We sympathize with the dilemma of older workers who, after many years of employment, are offered enhanced termination benefits for a waiver of legal rights. Yet, the introduction of these bills and the passage of recent appropriations legislation are not an authoritative interpretation of what the ADEA meant when the statute was enacted in 1967. See Pierce v. Underwood, 108 S. Ct. 2541, 2550-51 (1988). If Congress passes the bills that are now before it, the amendment will, of course, be an authoritative expression of what the 1989 Congress intended, see id., but until it does so, we can find no persuasive reason to disagree with the statutory

interpretation of our sister circuits. See Coventry, 856 F.2d at 521-22 & n.8; Runyan, 787 F.2d at 1043. Therefore, we hold that an unsupervised release of rights under the ADEA is permissible, subject to a close evaluation of various factors that are indicia of a "knowing" and "willful" waiver. See Coventry, 856 F.2d at 518.

Appellants also argue that even if an unsupervised waiver is permissible under certain circumstances, this one should be set aside because disputed issues of fact remain regarding whether appellants "were given sufficient time to make a considered choice" and whether they signed the separation agreements and releases knowingly and willfully. In considering this argument, we must first clarify the standard that should be used in deciding whether an employee signed a release

knowingly, willfully and free from coercion. The Fifth and Eighth Circuits appear to apply "ordinary contract principles" in determining whether a waiver has been signed "knowingly and willfully." See Lancaster, 809 F.2d at 541; Runyan, 787 F.2d at 1044 n.10. The Third Circuit applies a "totality of the circumstances" standard, which is apparently more stringent. Coventry, 856 F.2d at 524. The Third Circuit found "helpful" in determining whether a release is voluntary, id. at 523, the following enumeration of factors by Judge Lasker in EEOC v. American Express Publishing Corp., 681 F.Supp. at 219:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or

> consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

The list is obviously not exhaustive, and we would add to it whether an employer encourages or discourages an employee to consult an attorney, see Cirillo v. Arco Chem. Co., 862 F.2d 448, 454 (3rd Cir. 1988), and whether the employee had a fair opportunity to do so. In any event, we adopt the Third Circuit's "totality of the circumstances" standard, which is consistent with the strong congressional purpose underlying the ADEA to eradicate discrimination in employment. Coventry, 856 F.2d at 522-23. In adopting this standard, we stress again the need to examine carefully any situation in which an older worker bargains away the statutory right to be free from age discrimination.

Applying this standard to the case at hand, we find that although the district court did not explicitly use the "totality of the circumstances" standard, its "scrutiny of the circumstances" surrounding the signing of the releases was adequate. In its March 1988 opinion on AT&T's motion for summary judgment, the district court found that it was undisputed that appellants "were experienced executives familiar with reading and analyzing contracts;" that "the release itself is written in clear and unambiguous language," specifically referring to age discrimination claims; and that the release also states above the signature line that the signer is aware of the right to consult an attorney before signing it. The court also held that on the undisputed facts before it appellants had "sufficient time to consider the

release;" and that "there was no economic duress," conclusions that we cannot say were wrong. Accordingly, the district court was prepared to grant AT&T summary judgment on its motion, except for the factual issue of misrepresentation as to the effect of the releases. We believe that the district court sufficiently examined the "totality of the circumstances" surrounding the Plan with care and concern for the rights of older workers 1. We also agree that the only genuine factual issue was whether the company misrepresented the effect of the releases.

On the trial of this issue, we find no error in the district court's credibility determinations, findings of fact and conclusions of law and in its decision, therefore, to grant judgment to AT&T and to dismiss the complaint. In

affirming the district court's judgment, we do not suggest that we approve of termination plans like the one at issue in this Case. We agree with the district judge that this plan "was calculated to and did have an impact on the rights of some or all of these employees under the ADEA." However, we cannot say that the district judge erred in concluding that those rights were bargained away.

Appellants also argue that we should invalidate the release in this case because it does not involve a bona fide factual dispute over AT&T's motivation and intent such as existed in Runyan. The argument has not merit. In their brief, appellants admit that certain employees were suspicious of AT&T's motives prior to signing the releases. Appellants' keen interest in the legality of the releases at the Oakton meetings belies any claim

that they did not suspect that appellee may have had discriminatory motives in formulating the Plan.

Finally, appellants claims that the district court erred in granting AT&T summary judgment because he court failed to view all disputed issues of fact in the light most favorable to appellants and because it failed to afford appellants an opportunity for full and complete discovery. However, the judgment applied the appropriate standard on a motion for summary judgment in deciding whether there were disputed issues of material fact, and, indeed, found one, as shown above. In addition, the court not only gave appellants fully discovery on the issue of the enforceability of the separation agreement and release, which was all that was required in determining whether appellants' claims were barred by

appellee's affirmative defense, but also granted appellants' request in October 1987 to expand the scope of that discovery. In any case, appellants' failure to seek in the trial court the discovery they now say was denied them prevents them from raising the issue for the first time on appeal.

Since the principal issue on this appeal had not been directly addressed by this circuit previously, appellee's request for sanctions is denied.

The judgment of the district court is affirmed.

FOOTNOTE

1. Although appellants apparently did not have an opportunity to negotiate the terms of the waiver, which is one of the issues relevant to whether the release was signed knowingly and willfully, we do not believe that this fact alone requires a trial on "voluntariness." A company's willingness to negotiate the terms of a waiver is, in part, additional evidence for the court that the employees realized that they were giving up potentially valuable legal rights in exchange for consideration. In this case, other indicia, like the clarity of the waiver, make unmistakably clear that appellants were aware that they were giving up "important rights." Our conclusion in this case does not mean that this factor is irrelevant in considering the voluntariness of a waiver nor that, on other facts, we would not deny a company's motion for summary judgment due to its alleged unwillingness to negotiate the terms of a waiver.

So I think it perfectly credible, their testimony, that things were said and that if anything at least a response were given by AT&T other than the standard, pat response that they were instructed to give. I think it's credible that Mr. Gerdes or someone else from personnel said: We know that's a problem. And by letting that go unanswered, except by saying: Go see your own attorney or go consult your tax adviser, I think AT&T permitted the rumors that existed and all the plaintiffs' witnesses testified to, they permitted them to run rampant throughout the corporate grapevine and that's exactly what happened.

The very narrow issue upon which the hearings yesterday and today were conducted were whether or not anything was

said about the releases at the AT&T meetings at New York and White Plains. It's clear that a lot was said. Most of it, I grant you, on the basis — was said by the people attending the meeting. I think it's a reasonable inference, and also based upon the testimony of the plaintiffs, that AT&T responded as the plaintiffs say they did and the plaintiffs based their signing of the release upon those, upon the fact that it was said that the releases are of questionable validity.

THE COURT: All right. Thank you, sir.

The court will now make its findings of fact and conclusions of law. After I have finished stating them I will ask each attorney if they have any additional or further requests in order that the record may be complete.

This Court reiterates and adheres to its March 28th opinion in the memorandum and order in this case, and at that time the Court ordered that there be a trial solely pursuant to Rule 56 on the single fact issue of whether the defendant's managers misrepresented the enforceability of the Separation Agreement and release. The rest of the issues in the case have all been dealt with by this Court in its March 28th opinion and I am adhering to that opinion.

The Court treats the matter as based upon a prima facie case of age discrimination for each plaintiff, wholly and apart from the issue of the release for which each plaintiff was paid approximately $50,000 to sign away his rights. The particular plan pursuant to which these individuals were terminated is in evidence here today as Exhibit A, and

copies of this plan, as they were required to be under ERISA, were distributed to each of the persons who were designated as surplus management employees as a part of a compulsory surplus force reduction by the defendant company, which would of necessity affect persons protected by the Age Discrimination in Employment Act, hereafter the ADEA. Each of these plaintiffs was a mature and educated business executive with good command of the English language and each was given a copy of Exhibit A contemporaneously with meetings which would explain and discuss the plan and the implementation of the plan. And the document offered two separate options for those who were to be terminated. On page 2 of the plan, Option 1 was mentioned and the persons affected were each informed that in return for signing a full legal release they could

receive the 5 percent multiple; and they were informed since it involved a full legal release, "you may wish to consult your own attorney." Those words were underlined on page 2 of the plan.

Option 2 provided if the manager did not wish to sign a full legal release a 3 percent optional payment would be made and there would be no release.

There was attached to the plan a copy of the Termination of Payment Option Form; and the participants were also advised on page 8 if they had any question about their rights they could also contact the United States Labor Management Services Administration of the Department of Labor as required by ERISA. The Termination Payment Option Form in the top half, under Option 1, over the employee's signature, again provided the words: "I accept this

option one termination payment offer and am willing to sign a full legal release."

Option 2 is based on the theory of not wishing to sign a legal release. Both are on the same form.

Attachment 2 contains the form of Separation Agreement and Release for those employees electing option one. This document is in evidence, signed by each of these plaintiffs, and it's all a standard printed form.

Paragraph 4 calls specific attention to the rights of the employee under federal laws that prohibit employment discrimination on the basis of age. It contains the word "I intend to give up any rights I have under these or any other laws with resect to my employment." Further acknowledges that there was no discrimination or breach of contract or other unlawful action. The traditional

terms of a general release are otherwise set forth.

Again in paragraph 5 the release is extended to claims arising under federal, state or local laws prohibiting age discrimination.

The instrument contains an integration clause at paragraph 9 where the employee conceded that "This Separation Agreement and Release contains the entire agreement between the company and me."

At the signature page in capital letters the employee represents to the company that he has read it and understands it and knows that he is giving up important rights and is aware of his right to consult an attorney before signing it and has executed the agreement knowingly and voluntarily.

Against the background of that instrument in order to avoid the force of the fifth affirmative defense pleaded by the defendant in this lawsuit in its answer, any individual plaintiff could show at trial as to himself that the defendant committed fraud in the inducement and obtained his signature on the release by means of fraud in the inducement. The plaintiff could also prove alternatively that the defendant made or caused to be made negligently or intentionally a misrepresentation of fact going to the force and effect of the release, and that the particular plaintiff signed and executed and delivered the release in reasonable reliance on that misrepresentation of fact.

The Court rejects the defendant's contention that this later claim would have to be based on clear and convincing

evidence. The question of the validity of the release here would be governed by federal law representing recent departure from Erie principle, which in reality should regulate the giving of the release; and the Court believes that proof by a preponderance of the credible evidence of a representation which was either negligently made or deliberately made in falsity, followed by reasonable reliance would be sufficient to vitiate the releases and remit the plaintiffs to their rights under the statue which they purported to give away by the releases.

The Court considers insofar as the so-called grapevine testimony, that if it could be proved that an employee of the defendant having apparent authority to make a representation in connection with the matter had made a representation to one employee of the company under

circumstances under which a reasonable person so situated would have and did rely on it to his own detriment, that if thereafter through discussion between employees that false or misleading representation was conveyed to other employees and they also acted upon it, that those employees in the second group who relied upon information conveyed indirectly to them from a person having apparent authority to make an oral representation, would be entitled to rely and bring an action thereon just the same as if the representation was made to them directly.

In essence, the Court will deny the various motions to strike evidence about the grapevine testimony. The grapevine testimony, of course, is not being received as hearsay because it's not being received for the proof of the truth

therein. Indeed, the falsity of the statements is admitted and conceded by most everybody, so that the evidence is merely being received for purposes of showing that the statements were made.

We now have to consider the nature of statements made and received and the further issue, which is the serious issue in this case, whether those statements or representations can be relied upon.

Mr. Jacobsen testified that he attended the meeting in New York City in late October and that Mr. Hopeck and Mr. Gerdes were presiding or conducting that meeting. The direct testimony of Mr. Jacobsen was to the effect that someone had asked what would happen if a person accepted the 5 percent and then elected to sue; and it is alleged that Mr. Gerdes responded that in cases in which he knew about, employees generally prevailed.

Thereafter Mr. Jacobsen spoke with other coworkers about this general issue. The Court believes that there was discussion in the meetings about the validity of the release, but the Court declines to find Mr. Gerdes made the precise representation stated. Mr. Gerdes had been instructed to duck this issue by the law department of the company and the Court believes that it is more likely than unlikely that he pursued a policy of disclaiming any knowledge about the other plans and was generally evasive in his responses where these issues were raised with him. Whatever he said viewed most favorably to the plaintiffs I don't believe was sufficient to justify reasonable reliance in light of the expressed provisions contained in the release, the integration clause and the continuous reference in the instruments

and Exhibit A to the wisdom of consulting one's own attorney. I don't think any reasonable person could rely on a pattern of ducking and weaving, verbal ducking and weaving which this Court believes Mr. Gerdes engaged in and, indeed, he admits he did.

The Court finds Mr. Gerdes essentially credible and he has no interest in the lawsuit. He is not a plaintiff or defendant and he is no longer employed by AT&T Communications. So that the court declines to find that he advised the people that employees generally prevailed. The Court believes that he was evasive and essentially followed his directions and declined to say anything except to tell people they should speak to their attorney.

Mr. Jacobsen admits that he read and understood the papers and that he spoke

with other workers, other coworkers. Essentially all of the plaintiffs in this case believed that the release was void and that the plan that had been invoked by AT&T was deliberately discriminatory on the age issue. Indeed, they may have been right about that. Essentially they were relying on their own opinion in deciding to sign the instrument, deliver it, without any reservations and collect the $50,000, approximately, which was paid to each of them in return for signing it. The instrument contains a covenant not to sue, and then they went out and sued on it.

The Court does not believe that there was a fraud in the inducement as to Mr. Jacobsen or indeed anybody and declines to find that there was an express representation of fact that the release was void made by either Mr. Gerdes or Mr.

Hopeck or any other person with apparent authority to speak for the company.

The Court had the testimony of Mr. Gardner. And Mr. Gardner's testimony was to the effect that the legality of the release was not discussed. However, Mr. Fletcher later discussed it in January and the testimony of Mr. Gardner is a typical reflection of what AT&T did in this situation. Mr. Gardner said he thought that the document was not enforceable; and Mr. Fletcher, according to Mr. Gardner, shrugged his shoulders and moved on to another topic. Now that's about the clearest possible response that the authorized agent of the defendant could make and it would be impossible for anyone to rely reasonably on that in the face of the stark and clear language in the form of the release.

Insofar as the Quality of Life conversation is concerned, I am inclined to reject that testimony. Those persons who participated in the Quality of Life program had no apparent authority to deal with this issue of the release or the terminations. And the Court does note that Mr. Gardner did not mention the Quality of Life episode in the course of his deposition, and that does reflect adversely on the credibility when testimony improves so drastically between pretrial depositions and trial. The Court notes, however, that the witness did have conversations with other people about this issue and he told Fletcher that he didn't think it was enforceable. The Court believes he acted on his own opinion and not in reliance on anything that might have been said to him by the Quality of

Life presenters, if they did in fact say anything.

Insofar as Mr. Meyers was concerned, he testified that a response of one of the managers to inquiries at a meeting which he attended in White Plains and he said that one of the managers said nothing about the legality of the plan, and the response was ify, but similar cases have been struck down.

According to Mr. Meyers' testimony the company representative didn't say yes or no, but that similar cases had been taken down by the courts. This is not sufficient testimony to justify reasonable reliance on any representation that these releases in light of their form and content were void or voidable and could be signed and take the money without having any effect.

Mr. Taggi's situation is very similar. He was the one who said that he didn't think it was legal. And the company presenter said: Go see your lawyer if you're looking for legal advice. Thereafter he quotes Mr. Gerdes as saying that they shouldn't be concerned about it.

I decline to find that this conversation happened as reported by Mr. Taggi. However, Mr. Taggi conceded in his deposition that nobody from AT&T had done anything to show that they thought the release was invalid; and his testimony quoting Mr. Gerdes was not found in his deposition. The Court makes the same prior finding as to what Mr. Gerdes did.

Insofar as Mr. Saarts was concerned, the testimony seemed to be that the question was raised concerning the enforceability of the release. And the question was asked: What if you go and

sign it any way, is the company going to consider it valid. And he testified that in some known cases similar agreements had been declared invalid, according to the presenter. However, here again, this particular statement, if made, would not be sufficient to justify reasonable reliance in light of the expressed statements in the instrument itself and anybody that signed the instrument believing it to be illegal would be acting on his own intellectual conclusions and not relying unreasonably on anything the company had done.

Mr. Thomas McGuire's situation is somewhat different because his conversation was on a one-on-one basis. Here again Mr. Gerdes is not an interested witness and the Court has to remember that Mr. McGuire was a personnel specialist, and was read from his deposition, which

seems slightly inconsistent with the direct testimony.

The Court finds there was no proof that Mr. McGuire was given any statement which was sufficient for a reasonable person to rely on it in executing the releases, in light of the instrument's own words and the provisions in Exhibit A.

Mr. Bormann, again, is a situation where he discussed it with other people. He never mentioned Mr. Gerdes as having said it was illegal; and that: I told Mr. Fletcher he didn't believe it was valid. However, Mr. Bormann consulted his own attorney, so he did not rely on any of the company representations. In his case the attorney said the release was no good. I find he signed it. If he signed it under any misapprehension whatsoever, it was based on his reliance of his attorney's own opinion, together with his own

opinion, rather than in reliance of any misrepresentations of any agent with the defendant.

Insofar as concerns Mr. Ferrantino, the discussion he had was that he asked Mr. Cardello: Greg is this legal. He said that: He had heard it was not worth the paper it was written on. And the response he received was to the effect you are being asked to sign it. That's about as equivalent to the shrug of the shoulders which was testified to earlier by one of the other plaintiffs. Mr. Ferrantino had studied contract law in college.

The Court finds here again that there was not sufficient evidence of misrepresentations rising to the level which would justify reasonable reliance in light of the language of the instruments.

Insofar as Mr. Smith was concerned, he learned from Mr. Saarts that it

appeared it was just a piece of paper and didn't mean anything. No one made any misrepresentations to him personally. He too consulted an attorney. The attorney said he wasn't sure if it was legal, but that a specialist in labor law should be consulted. Based on that fact I find no reasonable reliance on his part.

Mr. Ferriter the Court finds spoke to Peter Galloway on the phone. Mr. Galloway said to him that such agreements are not always enforceable and advised him to go see a labor lawyer. The Court does not believe that it has demonstrated that Mr. Galloway had any capacity to make representations. No other representations were receiveed by Mr. Ferriter. He didn't speak with his boss or anyone else in higher management. The Court does not believe that that statement would be a sufficient representation to justify

reliance reasonably under the circumstances of this case. Apparently he also consulted an attorney although my Bench notes are not totally clear on that.

As to the other plaintiffs, the situation is practically identical. There is no proof here that there was any such representations beyond mere opinion or any factual or legal representations of a strength or character such as to permit a reasonable person to rely on them in light of the express language of release and the express language of Exhibit A.

The Court believes that Mr. Hopeck was given instructions not to comment on the legality of the release. And as I observed earlier, that's reasonable because -- and also of course Mr. Gerdes was given such instructions -- because in light of the documentation here anything that might be said orally about it would

have been detrimental and would have given rise to possible litigation or later claims of unfairness.

The Court believes that the note taker at the meetings whose notes are in evidence are maintained as a substantially correct record.

I don't think there are any other further or contested issues of fact which the Court must make in order to rule on this issue of the releases. The Court finds that a subjective belief on the part of any plaintiff that the releases were invalid is irrelevant to the issues of this case and unless that subjective belief in the invalidity of the release was reasonably derived from something done or said by persons in management having apparent authority to make representations and thereafter foreseeably conveyed to the plaintiff whose case is being considered

either by repetition of other employees or the so-called grapevine.

The Court has discussed apparent authority because its quite clear there was no actual authority to advise any of the plaintiffs that the release could not or would not be enforced. Indeed it's facially absurd for people who worked for this corporation for so many years and knew its practices to believe that they would be paid close to $50,000 extra for signing a useless or invalid paper, because money just doesn't come down from the skies that way.

The Court believes that anyone who signed and accepted the money without reserving their rights was at most gambling on his own subjective or personal opinion to the effect that the release could not or would not be enforced; and they cannot, by the proof presented here,

boot strap that belief into proof of action by the defendant which would make the release voidable. The release itself makes it quite clear to the person signing it that for a valuable consideration they are being asked to give up their legal rights to sue under the Age Discrimination Act. And we still have freedom of contract. These people are not wards of the court or anything. They were entitled to and urged to get independent legal advice; and, indeed, some of them did.

The Court concludes a waiver of rights can bar a private action under the ADEA so long as it's given for a valuable consideration, voluntarily and with full knowledge of the person's rights; and there is a failure of proof in this particular case to show that there was any such defect in any of the releases. And the Court finds, therefore, that the

claims of all the plaintiffs are barred by release as pleaded in the fifth affirmative defense in the defendant's answer; and, accordingly, in light of the Court's prior findings on March 28, 1988 and the Court's findings here at trial on this issue of the validity of the releases, that the judgment should be granted in favor of the defendant on all claims; and the Court dismisses the counterclaims on the theory that they were conditional only and based on some thought that perhaps the releases might be held invalid.

The Court will hear requests for additional findings. In making these findings I am not endorsing what was done here. I think this was calculated to and did have an impact on the rights of some or all of these employees under the ADEA. And I think they had a right to and

privilege and did sell their lawsuits by taking the difference between the 3 percent and the 5 percent; and, indeed, the law encourages the settlement of claims and the composing of differences by the payment of money, that's what happened here.

I will hear from you, Mr. Bradley, if you have additional requests.

MR. BRADLEY: No additional requests, your Honor, except I would point out that upon occasion in your findings you mentioned the release was given in exchange for $50,000. It was really in exchange for the difference between 3 and 5 percent.

THE COURT: That amounts to about 50,000.

MR. BRADLEY: No, 20.

THE COURT: The counterclaim says 50.

MR. BRADLEY: I don't recall the counterclaim saying 50.

THE COURT: Well, I will stand corrected: It's the difference between 3 5nd a percent. Even $20,000 is a substantial amount of money, even today. I adhere to my findings. I have corrected them to indicate it to amounts that were up to $20,000. Thank you for calling that to my attention. I don't think the legal theory is materially changed by that.

MR. FINGER: I would only note, according to my notes, you have not made specific findings with respect to plaintiff Ortler or Neville Smith.

THE COURT: The Court finds that essentially neither of them proved reasonable reliance on any misrepresentation on the part of anybody who had apparent authority to make such representation. We had stipulated that

Mr. Neville Smith's testimony would be the same as one of other plaintiffs who attended the same meeting he did.

And as far as Mr. Ortler is concerned, my recollection is that Mr. Ortler's testimony was that he discussed it with the other people who attended an Oakton meeting and he relied on what they reported to him. I would find essentially the same as to his case.

Anything else, sir?

MR. FINGER: No, your Honor.

THE COURT: The clerk is directed to enter judgment dismissing the complaint without costs.

Thank you.

MR. FINGER: Thank you, your Honor.

THE CLERK: The Court will be in recess.

(Whereupon, at 12:50 o'clock p.m. the Proceedings were concluded.)

MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT E. BORMANN, DOMENICK R. FERRANTINO, TIMOTHY J. FERRITER HARRY M. GARDNER, RONALD A. JACOBSEN JAMES W. MEYERS, HELMENT SAARTS, CORNELIUS J. SMITH, KARL ORTLER ALBERT J. TAGGI, NEVILLE SMITH AND THOMAS J. McGUIRE,

Plaintiffs,

- against -

AT&T COMMUNICATIONS, INC.,

Defendant.

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MEMORANDUM AND ORDER
87 Civ. 4134(CLB)

Brieant, Chief Judge

Plaintiffs were twelve second-level managers of AT&T Communications, Inc. ("AT&T") in New York City and White Plains, New York, who were declared surplus and terminated in 1986 as part of a reduction-in-force at AT&T. Defendant, as part of its reductions-in-force,

provided for separation payments to surplus management employees who were not placed in other available positions at AT&T by their separation date. The plan provided two options for an employee. Under the first option the employee could choose a lump sum termination payment equal to five percent of his base pay multiplied by the number of years of net credit service up to maximum of twenty years, but on the condition that the employee sign a full legal release. The second option was an unconditional lump sum termination payment equal to three percent of base pay multiplied by the number of years of net credit service up to maximum of twenty years. If the employee chose the five percent option, he had to sign a separation agreement and release which provided that he gave up all rights to institute a lawsuit relating to

his employment or termination of his employment. All of the plaintiffs selected the option which entitled them to receive five percent of their base pay, and signed a separation agreement and release.

Plaintiffs subsequently brought this suit against AT&T pursuant to the Age Discrimination In Employment Act ("ADEA"), 29 U.S.C. Sec. 621, et. seq. (1982), alleging that their terminations were due to their age, and thus discriminatory. AT&T raised the separation agreements and releases as an affirmative defense, and filed a counterclaim for breach of those agreements. In oral argument heard March 1, 1988 and on papers fully submitted on March 15, 1988, defendant moved for summary judgment with respect to the complaint and counterclaim, based upon the legal enforceability of the separation

agreements and releases. Defendant also moved to dismiss the claims of Neville Smith on the ground that he failed to first file with the Equal Employment Opportunity Commission.

The motion for summary judgment is denied since a genuine issue of material fact remains as to whether the defendant misrepresented the enforceability of the agreements and releases to the plaintiffs. The motion to dismiss the claim of Neville Smith is also denied.

Plaintiffs allege that the separation agreements and releases are unenforceable on various grounds. First, they argue that the separation agreements and releases are invalid because they were entered into without the supervision of the EEOC. Plaintiffs argue that a waiver of rights under the AEDA is unenforceable because the ADEA, 29 U.S.C. Sec. 626(b),

incorporates the enforcement provisions of Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. Secs. 216(b), 217, and that the Supreme Court in Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) and Schulte Inc. v. Gangi, 328 U.S. 108 (1946), held that the FLSA prohibited unsupervised waivers.

The Court concludes, however, that an unsupervised waiver of rights can be a bar to a private action under the ADEA, so long as it is knowingly and voluntarily given. See EEOC v. Cosmair, Inc., 44 FEP cases 569 (5th Cir. 1987); Lancaster v. Beurkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987), cert. denied, 107 S. Ct. 3212 (1987); Dorosiewicz v. Kayser Roth Hosiery, Inc., Dkt. No. 86-3163, (4th Cir. June 24, 1987) (unreported decision); Runyan v. NCR, 787 F.2d 1039 (6th Cir. 1986) (en banc), cert. denied, 107 S. Ct.

178 (1986). As was fully explained by the Sixth Circuit in Runyan, the Supreme Court in Brooklyn Savings Bank and Gangi held that a legal dispute over the applicability or coverage of the FLSA could not be waived. Id. at 1043. These decisions, however, still permit a private settlement of a bona fide dispute over a factual issue. Id. An unsupervised release of a ADEA claim based upon a bona fide factual dispute, such as whether or not the employee was terminated due to his age, therefore is not prohibited by Sec. 626(b) of the ADEA. Id. at 1044.

Further support for concluding that rights under the ADEA an be waived through a release, is found in considering the different purposes behind the FLSA and ADEA. They address the needs of two different segments of the work force. The goal behind the FSLA is to secure the

lowest paid segment of workers a subsistence wage. Gangi, 328 U.S. at 116. In contrast, the ADEA protects the rights of older workers, who are usually highly paid, experienced and capable of negotiating at arms length with their employer. That segment of the work force does not need the protective supervision of the EEOC, Runyan at 1043.

The issue to be decided on this motion, therefore, is whether the releases were knowingly and voluntarily given. Most of the circumstances of this case support a finding of a voluntary and knowing waiver by the plaintiffs. The employees were experienced executives familiar with reading and analyzing contracts. The release itself is written in clear and unambiguous language. For example, in para. 4 it states: "I realize that there are various State and Federal

laws that prohibit employment discrimination on the basis of age, ... I intend to give up any rights I may have under these or any other laws..." The release also states, above the signature line that: "I AM AWARE OF MY RIGHT TO CONSULT AN ATTORNEY BEFORE SIGNING IT."

Whether the plaintiffs had sufficient time to consider the release is also relevant to the determination of voluntariness. Paolillo v. Dresser Industries, Inc., 821 F.2d 81 (2d Cir. 1987). Only Neville Smith claimed that he did not have enough time to consider the release. The record shows, however, that he had four weeks to review the release and that he never asked for an extension of time. N. Smith dep. at 54-58. The court concludes, therefore, that in the circumstances of this case, he had sufficient time to consider the release.

Plaintiffs raise several arguments against a finding of a knowing and voluntary waiver. First, they claim that the defendants used economic duress to force them to sign the release. They do not allege that anyone in AT&T's management threatened or pressured them into signing the releases, but that the company structured the deal so that financial considerations made it impossible not to choose the option that gave the plaintiffs more money.

The Court concludes, however, that there was no economic duress applied in this case. In order to set aside an agreement on the ground that it was the product of economic duress, the party must make a convincing showing that the agreement was coerced by means of a wrongful threat such that the exercise of free will was precluded. Citibank, N.A.

v. Real Coffee Trading Co., 566 F.Supp. 1158, 1162 (S.D.N.Y. 1983) (Edelstein, J.); see also International Halliwell Mines, Ltd. v. Continental Cooper & Steel Industries, Inc., 544 F.2d 105, 108 (2d Cir. 1976); Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 130, 324 N.Y.S.2d 22, 25 (1971). Plaintiffs have made no such showing. The termination plan as presented to them did not prevent the exercise of free will. Admittedly, they faced a difficult choice. They could sign the release under the five percent option, and receive up to $20,000 more than they would under the three percent option, or they could choose the three percent option, and preserve their right to sue for damages in court. "Although [they] surely confronted a difficult dilemma- accepting the termination perks or pursuing [their] legal rights under the

employment agreement- the fact that the choice was difficult does not mean that [they] lacked the requisite free will to make the decision." Anselmo v. Manufacturers Life Ins. Co., 771 F.2d 417, 420 (8th Cir. 1985). It was the plaintiffs' choice to make. They could opt for the extra money immediately in consideration for giving up their right to bring a lawsuit, or sue AT&T for discrimination and let the jury determine the monetary measure of their injury. This choice is hardly economic duress.

Plaintiffs, however, raise an additional factual issue which prevents the Court from concluding that the the releases were voluntarily and knowingly given and awarding summary judgment to the defendant. Plaintiffs allege that in a presentation on October 21, 1985 in New York City, sponsored by AT&T to explain

the termination plan to the surplus employees, members of AT&T's personnel office from Oakton, Virginia, including Merl A. Gerdes and William Hopeck, stated in substance or implied that the releases were of doubtful legal enforceability. In his deposition plaintiff Mr. Jacobsen stated that: "we were told by the people from (Oakton, Virginia) there (at the meeting) that, well, and I don't have their exact words, but generally what we were told was that wherever they had researched companies using this kind of an approach, and people had sued, generally companies had lost, and the judges had ruled in favor of the employees." Jacobsen dep. at page 35. Furthermore, plaintiff Thomas McGuire stated with regard to a private meeting with Mr. Gerdes that: "I raised a question about the legality of the agreement. And he

confirmed for me, that what he had heard was that it had been found unenforceable; and, in general, gave me the impression that it was something that you need not concern yourself to a great deal about." McGuire dep. at page 53. Rumors of these statements spread quickly through the corporate grapevine. See e.g., Ferrantino dep. at 45.

In support of its motion, the defendant submitted the affidavits of Mr. Gerdes and Mr. Hopeck which state that in response to questions regarding the enforceability of the releases AT&T management advised the employees to consult with their own attorneys, tax advisors or financial consultants. Mr. Gerdes further states that he never advised Mr. McGuire that the separation agreement and release were unenforceable. These accounts contradict those offered by

the plaintiffs, and present a genuine issue of material fact and an issue of credibility which may not properly be resolved by affidavit. The Court, therefore, denies the defendant's motion for summary judgment.

Defendant also moved that the ADEA claim of Neville Smith as required, 29 U.S.C. Sec. 626(d). A claimant, in a deferral state like New York, must file a charge of age discrimination with the EEOC within 300 days after the alleged unlawful practice occurred as a condition precedent to the filing of an age discrimination suit in federal court. See Mohasco v. Silver, 447 U.S. 807, 823-824, n. 42 (1980). A plaintiff's failure to comply with this provision does not deprive the Court of subject matter jurisdiction, although noncompliance may create a procedural bar to the plaintiff's claim.

Because Sec. 626(d) is similar to a statute of limitations, however, it is subject to equitable modification. Franci v. Avco Corp., 538 F.Supp. 250, 253 (S.D.N.Y. 1982) (citing Zipes v. Trans World Airlines, 455 U.S. 385, 395 n, 11 (1982)); Galvin v. State of Vermont, 598 F.Supp. 144, 148 (D.Vt. 1984) (Billings, J.).

The Court determines that Neville Smith's claim is not barred by his failure to file with the EEOC. Efforts were made by Neville Smith to file on time with the EEOC, but probably due to the fact that two Mr. Smiths were filing claim, his attorney did not notice that the EEOC did not acknowledge receipt of his claim. Furthermore, there is no evidence of prejudice to the defendant, or that failure to file prevented the EEOC from making attempts at conciliation, since

none were made with respect to the other plaintiffs. The motion to dismiss Neville Smith's claim is therefore denied.

Because only one fact issue, whether the defendant's managers misrepresented the enforceability of the separation agreement and release, prevents an award of summary judgment for the defendants, the Court, in the interests of economy, orders a separate trial on this issue pursuant to Rule 42(b).

Counsel shall attend at Room 31 in the United States Courthouse, 101 East Post Road, White Plains, New York on April 15, 1988 at 2:00 P.M. for a final pretrial conference and to set a trial date.

SO ORDERED.

Dated: March 28, 1988
White Plains, New York

s/Charles L. Brieant
Charles L. Brieant
Chief Judge

No. 89-335

(2)

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT E. BORMANN, DOMENICK R. FERRANTINO, TIMOTHY J. FERRITER, HARRY M. GARDNER, RONALD A. JACOBSEN, JAMES W. MEYERS, HELMUT SAARTS, CORNELIUS J. SMITH, KARL ORTLER, ALBERT J. TAGGI, NEVILLE SMITH and THOMAS J. MCGUIRE,

Petitioners,

—v.—

AT&T COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI

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September 22, 1989

**Counsel of Record*

26 pp

QUESTIONS RESTATED

1. Whether the District Court's decision to grant judgment to the Respondent and dismiss the Complaint, after a plenary trial pursuant to Federal Rule of Civil Procedure 42(b), constituted, in effect, a grant of summary judgment and an abuse of discretion?

2. Whether the District Court erred in finding that Petitioners knowingly and voluntarily waived their rights under the Age Discrimination in Employment Act by signing a Release which the Court found: (1) was written in clear and unambiguous language, (2) specifically referred to age discrimination claims, (3) apprised Petitioners of their right to counsel, and (4) provided consideration in excess of that to which Petitioners otherwise would have been entitled?

STATEMENT REQUIRED BY RULE 28.1

AT&T Communications, Inc., is a wholly-owned subsidiary of American Telephone and Telegraph Company ("AT&T"). AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Cincinnati Bell Inc.; Edelson Technology Partners, L.P.; AT&T/Ricoh, Ltd.; AT&T Taiwan Telecommunications Co.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; ShareTech, Inc.; Covidea; Counterpoint Computers, Inc.; Omnicad Technology Corporation; Intermetrics, Inc.; AT&T Microelectronia de Espana, S.A.; Mitek, Inc.; Resound Corporation; Global Transactions Services Company; and Sun Microsystems, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-335

ROBERT E. BORMANN, DOMENICK R. FERRANTINO, TIMOTHY J. FERRITER, HARRY M. GARDNER, RONALD A. JACOBSEN, JAMES W. MEYERS, HELMUT SAARTS, CORNELIUS J. SMITH, KARL ORTLER, ALBERT J. TAGGI, NEVILLE SMITH and THOMAS J. MCGUIRE,

Petitioners,

—v.—

AT&T COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI

Defendant-Respondent AT&T Communications, Inc. ("AT&T") respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (the "Petition") be denied.

CITATIONS TO OPINIONS BELOW

Plaintiffs-Petitioners ("Plaintiffs") seek review of *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399 (2d Cir. 1989) (Feinberg, J.), reproduced as Appendix A to the Petition ("Pet. App. A"), at A-1 to A-22, which affirmed two unreported decisions of the United States District Court for the Southern Dis-

trict of New York (Brieant, C.J.): (1) a Memorandum and Order denying AT&T's motion for summary judgment and (2) post-trial findings of fact and conclusions of law dismissing Plaintiffs' Complaint.[1]

COUNTERSTATEMENT OF THE CASE

Plaintiffs are former AT&T managers who were laid off in early 1986 during a reduction-in-force. They commenced the present action on June 12, 1987, alleging that AT&T had dismissed them because of their age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). *See* Complaint, *passim*, DSA 4-36.

In its answer, AT&T denied the material allegations of the Complaint and interposed various defenses, including the fact that each Plaintiff had executed a Separation Agreement and Release (the "Release") which expressly waived any claim against AT&T for age discrimination. (A copy of the Release is reproduced in the Appendix hereto ("App."), at 1a-4a.)[2] *See* Answer, Fifth Affirmative Defense, DSA 60.

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1 The District Court's post-trial findings of fact and conclusions of law are reproduced in Defendant's Supplemental Appendix below ("DSA"), at 1300-17, and in Appendix B to the Petition ("Pet. App. B"), at A-24 to A-52. The District Court's Memorandum and Order denying summary judgment is reproduced at DSA 1058-66 and in Appendix C to the Petition ("Pet. App. C"), at A-53 to A-68.

2 The Release was part of the Company's "Termination Payment Plan for Surplus Management Employees and Summary Plan Description" (the "Plan") which had been adopted to provide separation benefits to managers affected by a reduction-in-force. DSA 1320-33. The Plan offered those employees who were designated as "surplus" a choice of two severance payment options. *See* DSA 1321. One option was unconditional, and allowed a surplus manager to choose a lump-sum termination payment equal to 3% of the manager's annual base pay multiplied by the manager's number of years of service, up to a maximum of twenty years. *Id.* Under this option, surplus managers with twenty or more years of service, like the Plaintiffs (Petition at 6), would each receive 60% of one year's salary (3% x 20 years = 60%). The second option enabled the surplus manager to elect, at his or her

On the basis of this defense, AT&T moved for summary judgment on December 31, 1987. In a Memorandum and Order dated March 28, 1988, the District Court concluded that "an unsupervised waiver of rights can be a bar to a private action under the ADEA, so long as it is knowingly and voluntarily given." DSA 1060, Pet. App. C at A-57. The Court, however, denied AT&T's motion for summary judgment, concluding that a factual dispute existed with respect to whether authorized AT&T managers had misrepresented the enforceability of the Release by stating or implying that "the releases were of doubtful legal enforceability." DSA 1064-65, Pet. App. C at A-64 to A-66. The District Court ordered a separate trial on this issue pursuant to Federal Rule of Civil Procedure 42(b).[3] DSA 1066, Pet. App. C at A-68.

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sole discretion, to increase the multiplier from 3% to 5% of annual base pay. DSA 1321. Under this option, a surplus manager with twenty or more years of service would receive 100% of one year's salary (5% x 20 years = 100%). This option, however, was conditioned on the manager's signing the Release, which is a five-page document written in clear and unambiguous language, specifically referring to age discrimination. *See* Release ¶ 3, App. at 1a.

The Release contains a general release and covenant-not-to-sue which "includes, but is not limited to, claims arising under federal, state, or local laws prohibiting age . . . discrimination. . . ." *Id.* ¶ 5, App. at 2a. Following an integration clause, the Release concludes with the following legend in capital letters, appearing directly above the signature lines:

> BY SIGNING THIS SEPARATION AGREEMENT AND RELEASE, I STATE THAT: I HAVE READ IT; I UNDERSTAND IT AND KNOW THAT I AM GIVING UP IMPORTANT RIGHTS; I AGREE WITH EVERYTHING IN IT; I AM AWARE OF MY RIGHT TO CONSULT AN ATTORNEY BEFORE SIGNING IT; AND I HAVE SIGNED IT KNOWINGLY AND VOLUNTARILY.

Id., p. 5, App. at 4a. Each of the Plaintiffs selected the 5% option and executed the Release. *See* DSA 1334-1405.

3 The Court also held that: (a) Plaintiffs had sufficient time to consider the Release; (b) the Release was clear and unambiguous; and (c) the Plaintiffs had not been compelled to sign the Release by "economic duress." DSA 1061-63, Pet. App. C at A-59 to A-63.

The case was tried to the court sitting without a jury on November 21 and 22, 1988. *See* DSA 1067-1317. Following the trial, the District Court dismissed the Complaint based on its findings that AT&T's personnel managers had not made any misrepresentations regarding the enforceability of the Release and that the Releases were signed knowingly, voluntarily and for valuable consideration. DSA 1300-17, Pet. App. B at A-24 to A-52.

Plaintiffs appealed the District Court's judgment to the United States Court of Appeals for the Second Circuit, which affirmed the judgment in all respects. *Bormann*, 875 F.2d 399, Pet. App. A at A-1. Citing similar cases from the Third, Sixth and Eighth Circuits, the Court of Appeals held that an "unsupervised waiver" of rights under the ADEA—i.e., a release supported by consideration and executed without the prior approval of the agency charged with the Act's enforcement, the Equal Employment Opportunity Commission ("EEOC")—is enforceable if knowing and voluntary. *Id.* at 401-02, Pet. App. A at A-8 to A-14. The Court also found "no error in the district court's credibility determinations, findings of fact and conclusions of law and in its decision, therefore, to grant judgment to AT&T and to dismiss the complaint." *Id.* at 403-04, Pet. App. A at A-18.

Plaintiffs then filed their Petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Plaintiffs have not presented this Court with any issue that would merit review. Plaintiffs' claim in Point I of the Petition, that the District Court should not have granted AT&T's motion for summary judgment, is wrong as a matter of fact, and, in all events, would not justify review by this Court. Despite Plaintiff's insistence, the District Court did not grant summary judgment to AT&T, but denied it. Judgment—not summary judgment—was entered against Plaintiffs only after a plenary trial on the issue which had prompted the District Court to deny AT&T's motion: whether AT&T personnel misrepresented the

enforceability of the Release. Ordering a separate trial on that issue was entirely appropriate under Federal Rule of Civil Procedure 42, and does not raise an issue worthy of this Court's attention.

Point II of Plaintiffs' Petition is equally unconvincing. Every circuit which has considered the issue has concluded that unsupervised waivers of ADEA claims are lawful when knowing and voluntary. In the case *sub judice*, the record establishes beyond peradventure that each Plaintiff signed the Release knowingly and voluntarily, in exchange for valuable consideration, and that no AT&T manager misrepresented the enforceability of the Release. The District Court reached this conclusion, the Second Circuit affirmed it, and no basis exists for this Court's review. Furthermore, the Second Circuit was entirely correct in concluding that the recent introduction of legislation regarding unsupervised waivers of ADEA claims has no bearing on the enforceability of the Release in the present case and does not represent an authoritative interpretation of what the ADEA meant when it was enacted in 1967.

The Second Circuit's holding is a correct application of well-settled principles and does not conflict with the decision of any other court of appeals. There is, therefore, no reason to grant the Petition.

ARGUMENT

I.

THE ISSUE OF WHETHER THE DISTRICT COURT'S DECISION TO GRANT JUDGMENT TO AT&T AND DISMISS THE COMPLAINT AFTER A PLENARY TRIAL PURSUANT TO FED. R. CIV. P. 42(b), WAS, IN EFFECT, AN ERRONEOUS GRANT OF SUMMARY JUDGMENT, DOES NOT MERIT REVIEW BY THIS COURT, AND, IN ALL EVENTS,WAS CORRECTLY DECIDED BELOW

Plaintiffs' first argument for granting the writ is that the District Court erroneously "granted" AT&T's motion for summary judgment. Petition at i and 13-16. The argument is entirely without merit. There is no assertion of a conflict among the circuits, the issue does not present a recurring theme which should be reviewed by this Court and the question has no importance beyond the parties involved in the present litigation.

The record clearly establishes that the District Court denied AT&T's motion for summary judgment and ordered a trial with respect to the issue of alleged misrepresentations by AT&T managers. Plaintiffs concede as much when they state that "[r]ather than deciding that issue on the pleadings, the Court set the matter down for trial." Petition at 15. Moreover, the District Court's ruling on AT&T's motion for summary judgment makes clear that the motion was denied:

> In support of its motion, the defendant submitted the affidavits of Mr. Gerdes and Mr. Hopeck which state that in response to questions regarding the enforceability of the releases AT&T management advised the employees to consult with their own attorneys, tax advisors or financial consultants. Mr. Gerdes further states that he never advised Mr. McGuire that the separation agreement and release was unenforceable. These accounts contradict those offered by the plaintiffs, and present a genuine issue of material fact and an issue of credibility which may not

> properly be resolved by affidavit. *The Court, therefore, denies the defendant's motion for summary judgment.*
>
> * * *
>
> Because only one fact issue, whether [AT&T] managers misrepresented the enforceability of the [Release], prevents an award of summary judgment for the defendants [sic], the Court, in the interests of economy, orders a separate trial on this issue pursuant to Rule 42(b).

DSA 1064-65 and 1066, Pet. App. C at A-65 to A-66 and A-68 (emphasis added). The District Court's decision to order a separate trial was entirely proper, and undermines totally Plaintiffs' assertion that summary judgment was granted.

It is well-established that Federal Rule of Civil Procedure 42(b) grants trial courts broad discretion to order separate trials "of any separate issue . . . or issues" in order to further "convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. . . ."[4] *See generally* 9 C.A. Wright and A.R. Miller, *Federal Practice and Procedure* § 2388, at 279-84 (1971 and Supp. 1989) and cases therein. Determining the effect of the Release in a separate trial before dealing with Plaintiffs' substantive claims, as the District Court did here, is well within the parameters of Rule 42(b). *See id.* and *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 83, 87 (2d Cir. 1939) (Clark, J., concurring). Accordingly, Plaintiffs' argument does not provide a basis for granting the Petition for certiorari.[5]

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4 The authority of the Court to order a separate trial is further supplemented by the Court's broad inherent power to regulate litigation before it. *See, e.g., Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-631 (1962); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 951 (9th Cir. 1976).

5 Even if summary judgment had been granted, certiorari would still not be appropriate. The Court of Appeals below held that the District Court "applied the appropriate standard on a motior for summary judgment. . . ." *Bormann*, 875 F.2d at 404, Pet. App. A at A-20. This Court spoke definitively on that standard just three years ago and

II.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS KNOWINGLY AND VOLUNTARILY WAIVED THEIR RIGHTS UNDER THE ADEA BY SIGNING A RELEASE WHICH (1) WAS WRITTEN IN CLEAR AND UNAMBIGUOUS LANGUAGE, (2) SPECIFICALLY REFERRED TO AGE DISCRIMINATION CLAIMS, (3) APPRISED PETITIONERS OF THEIR RIGHT TO COUNSEL AND (4) PROVIDED CONSIDERATION IN EXCESS OF THAT TO WHICH PLAINTIFFS OTHERWISE WOULD HAVE BEEN ENTITLED

Plaintiffs contend that the District Court erred in holding that they knowingly and voluntarily waived their rights under the ADEA by signing the Release. In support of their position, Plaintiffs present two arguments: First, that any waiver of rights under the ADEA is *per se* invalid (Petition at 27-28), and, second, that even if such waivers are not *per se* invalid, the facts in the present case do not support the District Court's factual finding that the Releases were signed knowingly and voluntarily (*id.* at 18, 20-21, 24 and 26). Plaintiffs' arguments are entirely without merit, and do not constitute a reason for review by this Court.

A. The Courts Below Correctly Followed the Uniform Rule among the Lower Federal Courts that Unsupervised Waivers of ADEA Rights Are Lawful If They Are Knowing and Voluntary

The question of whether an unsupervised waiver of rights is permissible under the ADEA has been considered by numerous courts of appeals, each of which has responded in the affirma-

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nothing about the present case requires the Court to revisit the issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 317 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

tive.[6] The seminal case is *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986) ("*Runyan*"). *Runyan* and its progeny have carefully analyzed the interplay among the ADEA, the Fair Labor Standards Act, 29 U.S.C. §§ 216 and 217 (1982) ("FLSA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), concluding that an unsupervised private release, knowingly and voluntarily signed, is valid under the ADEA. *Runyan*, 787 F.2d at 1041-43; *accord* cases cited *supra* note 6; *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (validity of Title VII releases).[7] These courts have uniformly rejected the suggestion that the FLSA controls the settlement of ADEA claims, focusing instead on a comparison between the ADEA and Title VII.

Under Title VII, a claim of discrimination may be released provided the release is made knowingly and voluntarily. *Alexander v. Gardner-Denver*, 415 U.S. at 52 & n.15. Since Congress intended that claims under both Title VII and the ADEA

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6 *Shaheen v. B.F. Goodrich Co.*, 873 F.2d 105, 107 (6th Cir. 1989) (per curiam); *Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 451 n.1 (3d Cir. 1988); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 521-22 n.8 (3d Cir. 1988); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987); *Dorosiewicz v. Kayser-Roth Hosiery, Inc.*, No. 86-3163 (4th Cir. June 24, 1987) (unpublished); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987); *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1030 (8th Cir. 1986). *See also Duke v. Uniroyal, Inc.*, No. 87-741-CIV-5-H (E.D.N.C. June 20, 1989) (LEXIS, Genfed library, Dist file); *O'Brien v. Beatrice Cos.*, No. 85 C 5462 (N.D. Ill. June 17, 1988) (LEXIS, Genfed library, Dist file); *EEOC v. American Express Publishing Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988); *DiMartino v. City of Hartford*, 636 F. Supp. 1241, 1245-48 (D. Conn. 1986).

7 Rights under other federal statutes governing the employer-employee relationship also can be waived. *E.g.*, *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361-62 (1952) (FELA); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942) (Jones Act); *Shaheen v. B.F. Goodrich Co.*, 873 F.2d at 107 (Equal Pay Act and 42 U.S.C. § 1981); *Roadway Express, Inc. v. NLRB*, 647 F.2d 415 (4th Cir. 1981) (NLRA). *See also Town of Newton v. Rumery*, 480 U.S. 386 (1987) (release of rights under 42 U.S.C. § 1983).

be resolved without delay, *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21, 24 n.2 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983), and invested the statutes with a common scheme for achieving the goal of cooperation and voluntary compliance, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979), analogizing the ADEA to Title VII in the context of the present case is entirely appropriate.

Perhaps recognizing this fact,[8] and being unable to articulate any reason for departure from the long line of well-reasoned decisions that have sustained knowing and voluntary waivers of ADEA rights, Plaintiffs suggest that the recent introduction of congressional bills[9] seeking to restrict the use of waivers of ADEA claims demonstrates that the ADEA does not permit an unsupervised waiver of rights. Petition at 27-28. Plaintiffs' suggestion is nonsensical. The introduction of this legislation does not constitute an authoritative interpretation of what the ADEA meant when it was enacted in 1967. *See Pierce v. Underwood*, ____ U.S. ____, ____, 108 S. Ct. 2541, 2550-51 (1988). Indeed, if any inference can be drawn from the current Congressional activity in this area, it is that Congress acknowledges that Releases are permitted under the ADEA and proposes legislation to alter that fact.

In all events, the Second Circuit's decision does not conflict with the decision of any other court of appeals, and Plaintiffs have failed to articulate any reason justifying this Court's review.

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8 Plaintiffs concede as much when they state that "the waiver that they executed does not bar them from pursuing their claim because it does not fulfill the requirements for a 'knowing' and 'voluntary' waiver of their rights." Petition at 17.

9 *See* Age Discrimination in Employment Waiver Protection Act, S. 54, 101st Cong., 1st Sess., 135 Cong. Rec. S357 (daily ed. Jan. 25, 1989) and H.R. 1452, 101st Cong., 1st Sess., 135 Cong. Rec. E816 (daily ed. March 15, 1989) (statement of Rep. Hawkins introducing House version of Age Discrimination in Employment Waiver Protection Act).

B. The District Court's Conclusion that Plaintiffs Knowingly and Voluntarily Signed the Releases Is Not Clearly Erroneous, and Does Not Merit Review by This Court

Plaintiffs argue that the District Court erroneously concluded that the Releases were knowingly and voluntarily signed. The claim, however, represents the quintessential fact-bound issue, having no importance beyond this case and providing no basis for review by this Court.

In its March 28, 1988 opinion on AT&T's motion for summary judgment, the District Court concluded that the following facts were undisputed: (1) that Plaintiffs were "experienced executives familiar with reading and analyzing contracts" (Pet. App. C at A-59); (2) that the "release itself was written in clear and unambiguous language" and specifically referred to state and federal laws prohibiting age discrimination (*id.* at A-59 to A-60); (3) that Plaintiffs had "sufficient time to consider the release" (*id.* at A-60); (4) that Plaintiffs were not the victims of "economic duress" (*id.* at A-61); and (5) that Plaintiffs received additional consideration in exchange for the Releases (*see id.* at A-54 to A-55 and A-63). The court, however, denied AT&T's motion on the ground that a "genuine issue of material fact and an issue of credibility" existed with respect to whether AT&T personnel misrepresented the enforceability of the Releases. *Id.* at A-66 and A-68.

After a two-day trial during which the court took testimony from each of the Plaintiffs[10] and several company witnesses, the court issued its findings of fact and conclusions of law, carefully explicating the reasons for its decision that the Releases were signed knowingly and voluntarily. The court specifically rejected Plaintiffs' misrepresentation theory on the basis of credibility determinations made during the trial. Pet. App. B at A-24 to A-52.

On appeal, the Second Circuit reviewed the facts and circumstances which the District Court scrutinized in reaching its

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10 Because Neville Smith was unable to appear at the trial, it was stipulated by the parties that his deposition testimony would be used in lieu of his actual appearance. DSA 1200-04.

decision that the Releases were properly and lawfully executed, approving the District Court's approach and affirming its determination. Indeed, the Court of Appeals stated specifically:

> that the district court sufficiently examined the "totality of the circumstances" surrounding the Plan with care and concern for the rights of older workers. We also agree that the only genuine factual issue was whether the company misrepresented the effect of the releases.
>
> On the trial of this issue, we find no error in the district court's credibility determinations, findings of fact and conclusions of law. . . .

Bormann, 875 F.2d at 403, Pet. App. A at A-18.

Because a determination of whether the Releases were knowingly and voluntarily signed is a finding of fact, the standard governing appellate review of the District Court's finding is that set forth in Federal Rule of Civil Procedure 52(a): "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This standard does not allow a reviewing court to reverse the finding of the trial court merely because it would have reached a different conclusion. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). Indeed, this Court has declared that "[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). This admonition applies even when the district court's findings are premised on physical or documentary evidence or inferences from facts, rather than merely credibility determinations. *Anderson v. City of Bessemer*, 470 U.S. at 574. Moreover, when findings are based on assessments of credibility, even greater deference to the trial court's determinations is required. *Id.* at 575. As this Court has stated: "[W]hen a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a

coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.*

Application of the foregoing principles to the facts of the present case shows that the Circuit Court applied the proper standard of review, and undermines totally Plaintiffs' bare assertion that the District Court erred in finding that the Releases were signed knowingly and voluntarily. Accordingly, there is no reason for this Court to review the decisions below.

CONCLUSION

For the reasons stated, the Petition for a writ of certiorari should be denied.

Dated: September 22, 1989

Respectfully submitted,

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APPENDIX

SEPARATION AGREEMENT AND RELEASE

In consideration of the fact that I, _____ (the Employee), have voluntarily, and of my own free will, elected to accept the termination payment in the amount of $_____ and that AT&T Communications, Inc. (the Company) has agreed to pay me a termination payment in the amount of $_____, I acknowledge and agree to the following:

1. I understand that as of _____ my employment with AT&T Communications, Inc. will cease.

2. I have been advised by the Company that I am being separated from the payroll of AT&T Communications, Inc. pursuant to the terms of the Company's surplus force reduction plan and that I am entitled to a termination payment in an amount equal to 3% of my current base pay multiplied by the number of years of net credited service, up to a maximum of 20 years. I have also been told by the Company, and understand, that I may elect, at my option, to increase my termination payment from 3% to 5% of my current base pay multiplied by the number of years of net credited service up to a maximum of 20 years, but that my election to receive this higher termination payment is expressly conditioned upon my signing this Separation Agreement and Release.

3. On a Separation Payment Option Form dated and attached hereto, I have elected to receive a 5% termination payment in return for signing this Separation Agreement and Release. I understand that this termination payment (5% rather than 3%) is being paid as consideration for my signing this Separation Agreement and Release.

4. I realize that there are various State and Federal laws that prohibit employment discrimination on the basis of age, sex, race, color, national origin, religion, handicap or veteran status and that these laws are enforced through the Equal Employment Opportunity Commission, Department of Labor and State Human Rights Agencies. I intend to give up any rights I may have under these or any other laws with respect to my

employment at AT&T Communications and acknowledge that AT&T Communications, Inc. has not (a) discriminated against me, (b) breached any express or implied contract with me or (c) otherwise acted unlawfully toward me.

5. Subject to paragraph 6 herein, on behalf of myself, my heirs, executors, administrators, successors and assigns, I release and discharge AT&T Communications, Inc., its successors, assigns, subsidiaries, affiliates, directors, officers, representatives, agents and employees ("Releasees") and the American Telephone and Telegraph Company, its successors, assigns, subsidiaries, affiliates, directors, officers, representatives, agents and employees ("Releasees") from any and all claims, including claims for attorney's fees and costs, charges, actions and causes of action with respect to, or arising out of, my employment or termination of employment with AT&T Communications, Inc. This includes, but is not limited to, claims arising under federal, state, or local laws prohibiting age, sex, race or any other forms of discrimination or claims growing out of any legal restrictions on the Company's right to terminate its employees. I agree to immediately withdraw, with prejudice, any charges, claims or actions that I instituted prior to my signing this Separation Agreement and Release and not to institute any future claims, charges or actions against AT&T Communications, Inc. or any Releasee for any reason.

6. I understand that this Separation Agreement and Release in no way affects any rights I may have for benefits under the AT&T Management Pension Plan or any other applicable AT&T benefit plan.

7. In accordance with my existing and continuing obligations to the Company, I have returned or will immediately return to the Company all Company information, including files, records, computer access codes and instruction manuals which I have in my possession. I further agree not to keep any copies of Company information. I affirm my obligation to keep all Company information confidential and not to disclose it to any third party in the future. I understand that the term "Company information" means: (a) confidential information, including

information received from third parties under confidential conditions, and (b) other technical, marketing, business or financial information, the use or disclosure of which might reasonably be construed to be contrary to the interest of the Company or its subsidiaries or affiliates.

8. I agree to keep this Separation Agreement and Release confidential and not to reveal its contents to anyone except my lawyer, my immediate family or my financial consultant.

9. This Separation Agreement and Release contains the entire agreement between the Company and me.

In the event that any one or more of the provisions contained herein shall for any reason be held to be unenforceable in any respect under the law of any state or of the United States of America, such unenforceability shall not affect any other provision of this Release, but, with respect only to that jurisdiction holding the provision to be unenforceable, this Release shall then be construed as if such unenforceable provision or provisions had never been contained herein.

BY SIGNING THIS SEPARATION AGREEMENT AND RELEASE, I STATE THAT: I HAVE READ IT; I UNDERSTAND IT AND KNOW THAT I AM GIVING UP IMPORTANT RIGHTS; I AGREE WITH EVERYTHING IN IT; I AM AWARE OF MY RIGHT TO CONSULT AN ATTORNEY BEFORE SIGNING IT; AND I HAVE SIGNED IT KNOWINGLY AND VOLUNTARILY.

Date: _____

Employee Signature

Date: _____

Employee Name Printed

Date: AT&T Communications, Inc.

By _____